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In the Supreme Court of the United States

OCTOBER TERM, 1978

EDWIN DAVID BANTA AND GEORGE HOHMANN,
PETITIONERS

v.

FIREFIGHTERS INSTITUTE FOR RACIAL EQUALITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

WALTER W. BARNETT
DENNIS J. DIMSEY
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-15) is not yet officially reported. The order of the district court (Pet. App. A-17 to A-22) is not reported. The previous opinion of the court of appeals is reported at 549 F. 2d 506. The previous opinion of the district court is reported at 410 F. Supp. 948, and its previous order of June 28, 1976 at 418 F. Supp. 383.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1978, and a timely petition for rehearing was denied on December 22, 1978 (Pet. App. A-16). The petition for a writ of certiorari was filed on March 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals' order requiring the promotion of twelve qualified black firefighters to the position of fire captain in the St. Louis Fire Department is an appropriate remedy under Title VII of the Civil Rights Act of 1964.

STATEMENT

1. The United States filed this case on March 18, 1974, pursuant to Sections 706 and 707 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5 and 2000e-6, alleging that the City of St. Louis had been and was engaged in a pattern or practice of racial discrimination in the employment of firemen. A pending suit commenced by the Firefighters Institute for Racial Equality, Inc. ("F.I.R.E.") was consolidated with the government's suit. The defendants were the City of St. Louis and various officials with employment responsibilities. Petitioners, representing a group of non-black employees of the Fire Department who held positions on a 1974 eligibility list for promotion to the rank of fire captain, intervened in the consolidated actions.[1]

The district court dismissed both suits. See *United States* v. *City of St. Louis*, 410 F. Supp. 948 (E.D. Mo. 1976). It held that the defendants had established that the promotion examination for the position of fire captain,[2] which disproportionately screened out black candidates, was a reasonable measure of job performance (*id.* at 956, 960).[3] Although it found that the examination for the entry level position of firefighter had a disparate racial effect and had not been validated (*id.* at 953-954), the court did not conclude that this test violated Title VII. The court also held that the exclusion of blacks from "supper clubs" in the firehouses was not the result of any action of the defendants and therefore did not violate Title VII (*id.* at 959.[4]

In response to the United States' motion requesting clarification and amendment of the judgment, the district court entered an order finding the firefighter examination invalid under Title VII and granting injunctive and hiring relief. See *United States* v. *City of St. Louis*, 418 F. Supp. 383 (E.D. Mo. 1976).[5] In all other respects, the court adhered to its original judgment.

The court of appeals reversed in substantial measure, holding that the fire captain promotional examination was invalid and that the City's complicity in the

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[1]The intervenors also included non-black applicants for employment who held places on a 1974 firefighters eligibility list.

[2]The position of fire captain is the first step above the entry level and the first supervisory position in the Fire Department. A fire captain is responsible for supervising a group of firefighters and equipment and for training persons under his supervision (410 F. Supp. at 951).

[3]From 1962 through 1971, ranking on the eligibility list for fire captain was based in substantial measure upon written tests; the City made no attempt to validate any of these tests or any other standards or requirements used for selecting those to be promoted to the rank of fire captain (410 F. Supp. at 953, 954). After March 24, 1972, when Title VII became applicable to state and local governments, 14 white firefighters and no black firefighters were promoted to fire captain on the basis of the 1971 eligibility list (Govt. Ex. G-19).

[4]Fire Department personnel, who spend a great deal of time living at the firehouse, had formed eating arrangements known as "supper clubs." Food and utensils were purchased jointly, and meals were cooked and eaten together. The City provided the cooking facilities in the firehouses (410 F. Supp. at 955).

[5]No appeal was taken from this aspect of the district court's judgment.

exclusion of blacks from the "supper clubs" was illegal. See *Firefighters Institute for Racial Equality* v. *City of St. Louis*, 549 F. 2d 506 (8th Cir. 1977).[6]

The court held that the 1974 written examination for promotion to the position of fire captain had not been properly validated. The City had conducted a "content validity" study, which involved an analysis of the nature of the fire captains' jobs and an assessment of the extent to which the written test measured the ability of candidates to perform on the job. The court concluded that a "fatal flaw in the validation study" was that "[t]he captain's exam admittedly failed to test the one *major* job attribute that separates a firefighter from a fire captain, that of supervisory ability" (549 F. 2d at 511; emphasis in original). Relying upon the Equal Employment Opportunity Commission's Guidelines on Employee Selection Procedures, the court held that the test could not be sustained because it "failed to test a job component comprising over 40 percent of the employee's time" (*id.* at 512).[7]

The City and the intervenors petitioned for a writ of certiorari, challenging only the court of appeals' ruling invalidating the 1974 fire captain examination. These petitions were denied. See *Banta* v. *United States*, 434 U.S. 819 (1977).

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[6]The court affirmed the district court's holdings (410 F. Supp. at 953, 955-956, 960) that F.I.R.E. had not established discrimination in the procedures for appointing battalion chiefs and in not promoting George Horne. See 549 F. 2d at 515-516.

[7]The court of appeals also held that the city had a duty under Title VII "to provide a nondiscriminatory working environment" (549 F. 2d at 515), and it therefore directed the district court to supervise the promulgation by the City of regulations providing that the "use of city facilities by supper clubs may not continue in a discriminatory and segregated manner" (*ibid.*).

2. On October 21, 1977, the district court entered an order prohibiting the City from using the 1974 test results as a basis for permanent or temporary appointments to the rank of fire captain (Pet. App. A-23). The order required that all appointments to the rank of fire captain be made on the basis of a valid examination, and permitted the City, pending development of such an examination, to appoint fire captains if at least 50 percent of the vacancies were filled with qualified blacks (*id.* at A-24). The order specified that all black applicants who had passed the 1974 fire captain examination and who were on the 1974 eligibility list were to be deemed qualified during the interim period (*id.* at A-24 to A-25). If the City wanted to make additional interim appointments, the parties were to determine a proper method for promoting other qualified black firefighters based upon the criteria of time-in-grade and efficiency ratings (*id.* at A-25). The order also instructed the City to issue regulations assuring the termination of any segregation in communal eating arrangements within firehouses (*id.* at A-25).

On January 26, 1978, the district court issued an order modifying its order of October 21, 1977 (Pet. App. A-17. This order arogated the provisions of the October 21, 1977, order requiring that blacks constitute at least 50 percent of those firefighters appointed to the rank of fire captain pending development of a valid test. Instead, the order authorized the City to make such interim appointments on the basis of departmental seniority and the

"Assessment Center technique" (*id.* at A-19 to A-20).[8] Alternatively, the order provided that, "pending development of a valid examination, the parties may agree upon any procedure they choose for making permanent or temporary or acting appointments to the position of Fire Captain" (*id.* at A-20). In all other respects, the January 26, 1978, order reiterated the provisions of the order of October 21, 1977.

3. Private plaintiffs appealed from the January 26, 1978, order claiming that the procedure in that order for promoting persons to fire captain positions pending development of a valid examination was inadequate because it failed to guarantee that any black firefighter would be promoted. The court of appeals found that the City's failure to make any permanent fire captain appointments since January 1974 discriminated against black candidates for promotion to that rank (Pet. App. A-9 to A-10). The court further held that "mere reinstatement of the provisions of the District Court's order of October 21, 1977, as requested by F.I.R.E., will [not] afford any greater relief than that afforded by the court's order of January 26, 1978, since under

[8]The Assessment Center technique is "a selection procedure which uses individual and group exercise to stimulate job responsibilities while assessors evaluate a candidate's performance" (Pet. App. A-5 n.4). The selection procedure established by the January 26, 1978, order is as follows. The City is to prepare a "racially-identified list of all firefighters who have served five years or more in the position of firefighter, in the order of the departmental seniority date of each firefighter" (*id.* at A-19). The black and white firefighters with the most departmental seniority are then to be evaluated by the Assessment Center technique; the individual receiving the higher score is to be promoted, regardless of race or comparative seniority (*ibid.*). The individual who is not promoted becomes eligible for the next fire captain vacancy, and is to be evaluated along with the black and white firefighters with the next highest seniority. The two unsuccessful candidates for that vacancy become eligible for the next vacancy, and so on (*id.* at A-19 to A-20).

neither order is the City required to make any permanent appointments to fire captain positions" (*id.* at A-11). It stated that "nothing short of an affirmative order requiring the immediate promotion of those black firefighters who are unquestionably qualified is necessary in order to redress the rights of those who have been the victims of the City's discrimination" (*ibid.*; footnote omitted). Accordingly, the court ordered the twelve black firefighters who had passed the 1974 examination—who the City conceded were qualified—to be promoted immediately to the rank of fire captain (*ibid.*). The court permitted the district court, in its discretion, to order the immediate promotion of 12 white firefighters who qualified for promotion on the basis of the 1974 examination (Pet. App. A-12).[9]

On December 19, 1978, the district court ordered the promotion of the 12 black firefighters, as well as 12 white firefighters, to the rank of captain (Pet. App. A-27 to A-28). These promotions took place on December 26, 1978. Under civil service regulations the promotions become final after a six-month probation period, which may be extended for an additional six months (Pet. 9).

[9]The court also required any additional permanent promotions to the rank of fire captain to be made in accordance with the Assessment Center technique (*ibid.*). It also provided that assignments to acting fire captain positions, pending development of a valid examination, were to "reflect a fifty percent black ratio as far as is practicable" (*id.* at A-13). Finally, the court affirmed a $12,500 attorney's fees award to F.I.R.E. and awarded F.I.R.E. an additional $4000 in attorney's fees for the appeal (*id.* at A-14 to A-15).

Only the intervenors have petitioned this Court for a writ of certiorari. Their petition challenges the court of appeals' decision only insofar as it ordered the immediate promotion of 12 black firefighters to the rank of fire captain.

ARGUMENT

1. Petitioners contend that the only discrimination found by the court of appeals with respect to promotions was the administration of the 1974 fire captain examination. Drawing a distinction between the *administration* of an invalid examination and the *implementation* of the results of such an examination, they contend that "[a]bsent actual illegal promotion of non-minority employees on the basis of an invalid examination, * * * a quota promotional remedy can never be 'appropriate' [equitable relief] within the meaning of Section 706(g) of Title VII * * *" (Pet. 12).[10]

Petitioners' argument rests upon a faulty premise. For, in addition to finding the administration of the 1974 examination discriminatory, the court of appeals also found discrimination in the City's failure to make any permanent fire captain appointments for almost five years following the commencement of this litigation in January 1974. The court of appeals held that "[t]he net result of the City's inaction is the continuation of a policy of discrimination against those black candidates for promotion who have been the

[10]Although the results of the 1974 examination were not used as a basis for permanent promotions to the rank of fire captain, assignments to acting fire captain positions were based in part on the results of this examination (Pet. App. A-12). "It is undisputed that those firefighters who serve as acting fire captains gain valuable supervisory experience which may give them a competitive advantage on any test for fire captain positions which is developed later" (*ibid.*).

victims of discrimination in the past" (Pet. App. A-10). The court correctly ruled that Title VII prohibits an employer from refusing to make any promotions where, as here, such refusal serves to perpetuate the effects of past discrimination. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). This discriminatory refusal by the City to make any permanent fire captain appointments justified the imposition of appropriate equitable relief under Title VII.

2. As this Court has consistently recognized, a federal court has not only the power, but also the duty, to render a decree in cases of racial discrimination that will as far as possible eliminate the effects of past discrimination, as well as bar like discrimination in the future. *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 770 (1976); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 364 (1977). The court of appeals in the instant case framed a limited decree designed to remedy the effects of past discrimination. That decree required the City to appoint only 12 black firefighters to the position of fire captain. All of these firefighters had passed the 1974 examination administered by the fire department, and all were conceded by the City to be qualified to perform a fire captain's duties (Pet. App. A-11). At the time the court issued its order in November 1978, approximately 50 of the 180 fire captain positions were vacant, and only one black held the rank of fire captain (*id.* at A-9). The City had failed to make any promotions to that rank since 1974, and that failure had adversely affected both the morale and the efficiency of the department (*id.* at A-10 &

n.9). Moreover, the remedial orders entered by the district court had failed to require the promotion of any black firefighters pending development of a properly validated examination (*id.* at A-11), and the City had determined not to promote any firefighters during this interim period (*id.* at A-10 & n.8) and had made little progress in developing a valid test since this Court's previous denial of certiorari in this case on October 3, 1977 (*id.* at A-9). In these circumstances, the court of appeals correctly concluded that "[c]ontinued inaction * * * will serve neither to vindicate the rights of those black firefighters who have been the victims of past discrimination nor to give the people of St. Louis the fire protection which they deserve" (*id.* at A-14).

3. It is clear that numerical relief such as that mandated by the court of appeals may be imposed in an appropriate case. The 1972 Amendments of Title VII, which apply here, added to Section 706(g), 42 U.S.C. 2000e-5(g), authority to award "any other equitable relief as the court deems appropriate." That language must be read against congressional rejection of proposed amendments that would have barred numerical relief (118 Cong. Rec. 1676, 4918 (1972)) and the express approval of two decisions authorizing such relief by Senators Javits and Williams, the principal spokesmen against the limiting proposals (*id.* at 1662-1676, 4917-4918). See *United States* v. *Intern. Union of Elevator Constructors*, 538 F. 2d 1012, 1019-1020 (3d Cir. 1976).

4. Contrary to petitioners' assertion (Pet. 16-17), the courts of appeals are not divided on the appropriateness of using numerical relief in shaping a remedy for past discrimination. Appropriately tailored numerical relief

has been upheld in all eight circuits that have considered the matter, where such relief is necessary to rectify the effects of past exclusionary practices.[11] *Harper* v. *Kloster*, 486 F. 2d 1134 (4th Cir. 1973), relied upon by petitioners as creating a conflict among the circuits on this issue, held only that the district court's refusal to impose the requested relief, on the facts of that case, was not an abuse of discretion. And in *Kirkland* v. *New York State Department of Correctional Services*, 520 F. 2d 420, 428 (2d Cir. 1975), cert. denied, 429 U.S. 823 (1976), the court held that goals were not warranted because of "the paucity of the proof concerning past discrimination." Accord, *Sledge* v. *J. P. Stevens & Co.*, 585 F. 2d 625 (4th Cir. 1978). The Second Circuit has approved the imposition of goals in appropriate circumstances both before and after *Kirkland*. See note 11, *supra*.

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[11]See, *e.g.*, *Morgan* v. *Kerrigan*, 509 F. 2d 599 (1st Cir. 1975); *Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher*, 504 F. 2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975); *Patterson* v. *Newspaper and Mail Deliverers' Union*, 514 F. 2d 767 (2d Cir. 1975); *Rios* v. *Enterprise Ass'n Steamfitters Local 638*, 501 F. 2d 622 (2d Cir. 1974); *Equal Employment Opportunity Commission* v. *American Telephone & Telegraph Co.*, 556 F. 2d 167 (3d Cir. 1977), cert. denied, Nos. 77-241, 77-242 and 77-243 (July 3, 1978); *NAACP* v. *Allen*, 493 F. 2d 614 (5th Cir. 1974); *Morrow* v. *Crisler*, 491 F. 2d 1053 (5th Cir.) (en banc), cert. denied, 419 U.S. 895 (1974); *United States* v. *Local 212, Electrical Workers*, 472 F. 2d 634 (6th Cir. 1973); *United States* v. *Masonry Contractors Ass'n*, 497 F. 2d 871 (6th Cir. 1974); *United States* v. *City of Chicago*, 549 F. 2d 415 (7th Cir.), cert. denied, 434 U.S. 875 (1977); *Crockett* v. *Green*, 534 F. 2d 715 (7th Cir. 1976); *United States* v. *N. L. Industries, Inc.*, 479 F. 2d 354, 377 (8th Cir. 1973); *Carter* v. *Gallagher*, 452 F. 2d 315, 331 (8th Cir.) (en banc), cert. denied, 406 U.S. 950 (1972); *United States* v. *Ironworkers Local 86*, 443 F. 2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971).

The imposition of limited numerical requirements in the context of the particular factual circumstances present here was well within the court of appeals' authority and does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

WALTER W. BARNETT
DENNIS J. DIMSEY
Attorneys

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